IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2008 Session

KATHY HUBER, ET AL. v. DOUGLAS MARLOW, ET AL.

Interlocutory Appeal from the Circuit Court for Knox County
No. 1-346-04 Dale C. Workman, Judge

No. E2007-01879-COA-R9-CV - FILED JULY 10, 2008

OPINION DENYING PETITION FOR REHEARING

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. KELLY THOMAS, JR., SP. J., joined.

The Appellants, Plaintiffs Kathy Huber and Barbara Pendergrass, have filed a Petition for Rehearing pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure. Upon review of the Appellants' arguments, which have been thoroughly and respectfully presented, and the record as a whole, we find the petition is not well taken.

The Plaintiffs' petition for rehearing is largely a reiteration of their arguments already contained in their appellate brief, albeit more thoroughly presented and including references to cases and authorities not previously cited in support of these arguments. The petition does not persuade us that the analysis and result reached in our lead opinion was erroneous, but it does provide occasion to reiterate and emphasize exactly what was and was not alleged in the complaint and amended complaint.

The Plaintiffs' primary argument is that this court erred in holding that the allegations based solely on Dr. Rankin's conduct contained in the amended complaint, filed more than three years after the injury and after the statute of repose had run as against Dr. Rankin, did not relate back to the original complaint, which was timely filed against Dr. Marlow and Internists of Knoxville. In support of this argument, Plaintiffs make assertions that are not supported by the record. The petition argues as follows:

> The Appellants' amended complaint simply added a new claim against the Group [Internists of Knoxville], it did not assert a new cause of action against the Group, nor did it attempt to add a new party. The Group was a party defendant from the date of the initial

> complaint, and *there is no question the Group had notice that the Plaintiffs were asserting their rights as to the conduct of the Group's employees relating to Ms. Chenoweth's treatment*.

(Emphasis added). Plaintiffs also assert that "they properly filed a complaint against the Group for the negligence of its employees and agents in the treatment of Ms. Chenoweth while a patient at Baptist Hospital."

In fact, the complaint makes no mention of the *respondeat superior* doctrine, nor that Dr. Marlow nor anyone else were employees of Internists of Knoxville. The complaint does not allege that Internists of Knoxville was a principal or employer nor that any agent or employee was acting on its behalf. The entire allegations of the complaint as against Dr. Marlow and Internists of Knoxville are as follows:

> That the Defendants Douglas Marlow, MD and Internists of Knoxville, in their care and treatment of the decedent, acted with less than or failed to act with ordinary and reasonable care in accordance with the recognized standard of acceptable professional practice for physicians [in] the Knoxville community or similar community at the time of the decedent's injuries and ultimate death.
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> Dr. Marlow and Internists of Knoxville failed to provide and maintain adequate care and supervision for the decedent, Elizabeth Chenoweth, when they knew or should have known in the exercise of due care that the decedent's mental and physical condition was such that a lack of supervision and adequate care would be dangerous to the patient.
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> That Dr. Marlow and Internists of Knoxville failed to adequately monitor the Defendant, Baptist Hospital's supervision and care of the decedent, Elizabeth Chenoweth.

The complaint further alleges that "*the Defendant, Baptist Hospital* of East Tennessee, Inc., *through its employees and agents*, failed to maintain adequate care and supervision for the decedent." (Emphasis added). But there is no similar employer/employee or principal/agent allegation as regards Internists of Knoxville. As we noted in our lead opinion, "the original complaint made no allegations, general or otherwise, against Dr. Rankin or any other employee of Internists of Knoxville besides Dr. Marlow." Although it was eventually undisputed that Drs. Marlow and Rankin were its employees and it became clear that the only possible avenue of liability as against Internists of Knoxville was the *respondeat superior* doctrine, the complaint did not even allege that Dr. Marlow was an agent/employee of Internists of Knoxville and provided no notice that the Plaintiffs intended to rely on vicarious liability or *respondeat superior.*

In the case of ***Hawk v. Chattanooga Orthopaedic Group, P.C.,*** 45 S.W.3d 24 (Tenn. Ct. App. 2000), a case upon which the Plaintiffs heavily rely, this court engaged in a thorough review of the prior case law and analysis regarding the concept of notice as applied to the relation back

doctrine found in Tenn. R. Civ P. 15.03, stating as follows:

> In 1984, the Court of Appeals decided the case of ***Gamble v. Hospital Corp. of America,*** 676 S.W.2d 340 (Tenn. Ct. App. 1984). In that case, we found that an amendment alleging negligence in a *second* operation did not relate back to an earlier complaint alleging negligence during an *earlier* operation. ***Id.*** at 347. We held "that although the *subsequent operation* might arise out of the 'conduct, transaction or occurrence' in the original pleading, the *claim* of negligence in the second operation did not arise out of the 'conduct, transaction or occurrence' set out in the original pleading." ***Id.*** (Emphasis in ***Gamble***). In the course of our opinion, we discussed several federal cases holding that notice was a key element in determining whether an amendment relates back to the date of an earlier pleading. ***Id.*** at 343-47. With respect to the notice question, we stated that
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> > [w]hile we do not reject the notice analysis used in the federal court decisions and recommended by leading scholars, we are of the opinion that we do not get to the question of notice. In this case we look solely to the statutory language and the decision of our Supreme Court which addressed the question of relation back solely in terms of the statutory standard.
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> ***Id.*** at 347.
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> On August 20, 1984, the Supreme Court denied permission to appeal in the ***Gamble*** case and, on the same day, decided ***Floyd v. Rentrop,*** 675 S.W.2d 165 (Tenn. 1984), another case concerning the relation-back doctrine in the field of medical malpractice. It is true that the Court stated in that case that "[n]otice is the critical element involved in determining whether amendments to pleadings relate back." ***Id.*** at 168. However, the amendment in that case sought to add a new party defendant. ***Id.*** at 166. The language of Rule 15.03 provides that additional requirements, *including notice,* must be met when this is the case . . . . Therefore, we do not believe that ***Floyd*** can be read as requiring the element of notice for amendments not seeking to change the name of a party or otherwise seeking to name a new party.
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> From these cases, we conclude that, where an amendment does not seek to change a party or name a new party, Tennessee courts are to determine whether the amendment relates back to the date of an earlier pleading according to the "virtually self-construing" language

of Rule 15.03.

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> As previously stated, our appellate decisions analyze the issue of relation back on the "virtually self-construing" language of Rule 15.03, *see* ***Karash,*** 530 S.W.2d at 777, without imposing a notice requirement not found in the rule. While notice may be a useful analytical tool in attempting to determine whether an amendment arises out of the same conduct, transaction, or occurrence as the original pleading, notice is not an element unto itself.

Hawk, 45 S.W.3d at 29-31. ***Hawk*** indicates that whether notice is an actual requirement for the application of the relation back doctrine depends on whether the amendment seeks to change a party or add a new party. If it does seek to add a new party, the plain language of Rule 15.03 requires notice, among other things. If it does not, then ***Hawk*** indicates that notice is not a required element, although "notice may be a useful analytical tool." ***Id.***

Did the Plaintiffs seek to add a new party with their amendment? Here, we have a situation rather unusually in between: technically, Internists of Knoxville was an original party defendant, but we cannot close our eyes to the reality that the new allegations filed more than three years later regarding the administration of heparin are completely dependent on, and arise from, the actions of Dr. Rankin, who was never a party to the action. Under these circumstances, although notice may not be a requirement, common sense, reason, and notions of fairness support the conclusion that the issue of whether notice was provided to the defendant in the original complaint regarding the application of *respondeat superior*, and the possibility that the plaintiff is bringing his or her action against possibly as-yet unnamed employee/agents, is relevant to the relation back analysis.

In the present case, as thoroughly documented above, notice was wholly lacking in the complaint that Plaintiffs were alleging *respondeat superior* or claiming that Internists of Knoxville was vicariously liable for actions of its employees. The complaint does not contain any general allegation against Internists of Knoxville regarding agency theory upon which Plaintiffs can rely in support of their relation back argument.

The petition for rehearing is respectfully denied. Costs related to this Rule 39 Petition for Rehearing are assessed to the Appellants, Kathy Huber, individually and on behalf of Elizabeth Chenoweth as her surviving child and next of kin, and Barbara Pendergrass, individually and on behalf of Elizabeth Chenoweth as her surviving child and next of kin.

SHARON G. LEE, JUDGE